Volume 29, Number 10
July 2019

CALIFORNIA WATER LAW & POLICY Reporter™

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Subscription Rate: 1 year (11 issues) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 506; Auburn, CA 95604-0506; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

FEATURE ARTICLE

CALIFORNIA WEIGHS IN ON WETLANDS

By Clark Morrison and Scott Birkey

On April 2, the State Water Resources Control Board (SWRCB) adopted sweeping new regulations for the protection of wetlands and other waters of the State of California. The regulations, carrying the ungainly title, *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State* (collectively: Procedures), will become effective nine months following the completion of review by the California Office of Administrative Law. Once effective, the Procedures will layer on additional complexity to an already onerous permitting regime for the fill of wetlands and other waters in California.

The Procedures include two principal parts. The first is a statewide definition of the term "wetlands" that includes certain features that are not treated as wetlands under the federal Clean Water Act. The second is a set of rigorous permitting standards and application requirements to be implemented by the Regional Water Quality Control Boards (RWQCBs) in their review of applications for "Section 401 Certifications" and "Waste Discharge Requirements" under the Porter-Cologne Water Quality Control Act. The Procedures are intended for inclusion in the State's *Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California*.

Background

The Procedures were adopted in the context of the Trump administration's proposed roll-back of federal wetland jurisdiction under § 404 of the Clean Water Act. Although California originally proposed adopting its own wetland definition during Governor Wilson's administration—and the Procedures had been in the works for ten years—it was the Trump administration's proposed roll-back that provided the impetus for final adoption.

Following the U.S. Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County* (*SWANCC*), which eliminated federal jurisdiction over isolated non-navigable waters, the SWRCB began to assert state jurisdiction over those features. Until then, the RWQCBs generally regulated wetland fill activities only when presented with a proposed U.S. Army Corps of Engineers (Corps) permit requiring state certification under § 401 of the Clean Water Act. When the Corps stopped regulating isolated wetlands and other waters, the RWQCBs lost their regulatory hook under § 401. In order to "fill the *SWANCC* gap," as many of us described it, the RWQCBs began to regulate the fill of these features, independently, through the issuance of Waste Discharge Requirements (WDRs) under their Porter-Cologne authority.

It eventually became apparent that the RWQCBs had no consistent standards to apply in either the § 401 certification or WDR processes. Accordingly, in 2008, the SWRCB directed its staff to develop a state-wide wetlands definition and a set of permit standards for the discharge of dredged or fill material to wetlands and other "waters of the State" (*i.e.*, the Procedures). The process to develop the Procedures was slow and painstaking. In fits and starts over the next nine years, the SWRCB released drafts of the Procedures and other materials related to the Procedures.

Then came the national election in 2016 and the arrival of a new federal administration. Shortly after being elected, President Trump issued an Executive Order on February 28, 2107, signaling his intent to

"repeal and replace" an Obama-era regulation that defined federal wetland jurisdiction quite broadly based upon Justice Kennedy's opinion in the Supreme Court's decision, *Rapanos v. United States*, 547 U.S. 715 (2006); *See*, https://www.supremecourt.gov/opinions/05pdf/04-1034.pdf.

The President's proposal, published in the Federal Register on February 14, 2019, would limit federal jurisdiction under the Clean Water Act, essentially to traditional navigable waters, their tributaries, and abutting wetlands. The comment period on the new definition closed on April 15, 2019.

The Executive Order created a flurry of activity at the SWRCB. Later in 2017, the SWRCB issued an updated version of the Procedures and initiated a renewed stakeholder and hearing process that became fairly intense in late 2018 and continued until final board action on April 2, 2019.

The Wetlands Definition

Much of the public debate focused on the Procedures' inclusion of a wetland definition that is broader than the federal definition. Under the federal definition, an area is a wetland if it satisfies three parameters: wetland hydrology; wetland (hydric) soils; and, *[under normal circumstances,]* the presence of wetland (hydrophytic) plants in certain concentrations. Under the state's definition, an area will be classified as a wetland if it exhibits wetland hydrology and wetland soils under normal circumstances, even if the area lacks vegetation (although if the area does exhibit vegetation, that vegetation must by dominated by hydrophytes to be considered jurisdictional). Think mudflats, playa pools and similar features. As such, the state definition eschews the three-parameter test in favor of a two-parameter test, jettisoning the requirement that hydrophytic vegetation be present before a feature can be considered a wetland.

The state's expanded wetlands definition caused considerable consternation throughout the regulated community, including homebuilders, mining interests, agriculture and public water and flood control agencies. Not only does the definition expand wetland protections to new areas, but it also creates the potential for confusion and inconsistency in the permitting of projects that include federal wetlands and other waters of the United States (WOTUS) and non-federal wetlands and other waters or the State (WOTS). That is, even though the state and federal government will apply the same technical manuals (*i.e.*, the 1987 Wetlands Delineation Manual and the Regional Supplements; *See*, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/) in determining whether an area meets certain parameters, the ultimate jurisdictional calls and applicable permits standards for any particular project or area may be quite different as between the two levels of government. Unfortunately, industry's efforts to push back on the state's proposed two-parameter definition were effectively countered by the environmental community, which expressed considerable disappointment in the state's failure to adopt a one-parameter definition.

To make matters more confusing, the Procedures state that "artificial wetlands" are considered waters of the State except in very narrow circumstances. In particular, any artificial wetland greater than one acre in size is jurisdictional unless it *currently* used and maintained primarily for one of eleven identified purposes (various types of water and stormwater treatment purposes, crop irrigation or stock watering, fire suppression, industrial processing or cooling, active surface mining, log storage, groundwater recharge, and fields flooded for rice growing). These identified exemptions for artificial wetlands are subject to some additional specific limitations and, in any case, are considerably narrower than those provided by the Corps even under the expansive wetland regulations promulgated by the Obama administration.

Making matters worse, the problem of different—and in some instances potentially irreconcilable—state and federal wetland definitions are dwarfed by broader questions of state and federal jurisdiction over waters under the Clean Water Act (which is limited by questions of isolation and navigability at issue in *SWANCC*, *Papanos* and both the Obama-era and Trump's newly proposed regulations). Given that the Procedures establish a permitting program for all waters of the State, and not just wetlands, one might reasonably ask whether the parameter wetlands definition really makes that much difference. In fact, there are only a couple of places in the Procedures where wetlands are treated more strictly than are other waters (one of which is a minimum 1:1 replacement mitigation ratio, which in most cases will be fairly meaningless given the Procedures' overall "no net loss" mitigation standard).

Permitting Standards and Procedures

As described above, the Procedures establish permitting requirements that will be implemented through the state's existing 401 certification and WDR processes, and do not supplant those regulations. They will, however, make things more challenging from an applicant's perspective. A few examples follow.

Alternatives Analyses

Under federal regulations known as the "Section 404(b)(1) Guidelines," an applicant has the burden of demonstrating that his or her proposed project is the "least environmentally damaging practicable alternative," or "LEDPA." For most projects, the Guidelines presume that a proposed project is not the LEDPA. That is, the Guidelines presume that there are available and practicable alternatives to the project with less impact on the aquatic environment. To rebut this presumption and obtain a permit, an applicant may have to prepare a very detailed and complex "LEDPA analysis" relying on the services of biologists, civil engineers, attorneys and, in some circumstances, land economists. These analyses, and subsequent negotiations with the agencies, often take years to complete even for small to moderately-sized projects. Typically, the LEDPA requirement is the biggest hurdle to permit issuance.

The Procedures adopt the § 404(b)(1) Guidelines, with modifications, for covered projects. The thresholds triggering preparation of a LEDPA analysis under the Procedures are quite low. Any project filling more than 1/10 acre or 300 lineal feet of waters must prepare an on-site alternatives analysis. Any project filling more than 2/10 acre or 300 lineal feet of waters must prepare both an on-site and off-site LEDPA analysis. This is in contrast to the Corps and its permitting requirements, which in most cases does not require a LEDPA analysis for small projects falling within the scope of its nationwide permit program, including its nationwide permits for Residential Development (NWP 29) and for Commercial and Institutional Developments (NWP 39). The Procedures contain a nominal exemption for such projects, but the exemption is not available for projects affecting wetlands or rare, threatened or endangered species habitat, making it almost meaningless.

The San Francisco RWQCB has been requiring LEDPA analyses for some time now, so applicants in the San Francisco Bay Area may not see much change as a result of this requirement. In other regions of the State, the water boards will have a significant learning curve with respect to LEDPA analyses as the Procedures begin to kick in. Although the SWRCB intends to provide additional guidance and training for the Regions, given the already understaffed status of the Regions, this new LEDPA requirement likely will result in some agency growing pains that project applicants may suffer.

Compensatory Mitigation

The Procedures require a mitigation plan to demonstrate that project-related impacts, together with mitigation, will not "cause a net loss of the overall abundance, diversity, and condition of aquatic resources" on a watershed basis. This determination must be made based upon a potentially very complex "watershed profile" prepared by the applicant. This watershed profile must include, for example:

> . . .information sufficient to direct, secondary (indirect) and cumulative impacts of [the] project and factors that may favor or hinder the success of compensatory mitigation projects and help define watershed goals. It may include such things as current trends in habitat loss or conservation, cumulative impacts of past development activities, current development trends, the presence and need of sensitive species, and chronic environmental problems and site conditions such as flooding or poor water quality.

Generally speaking, projects whose watershed profiles are developed from an existing watershed plan will be subject to more favorable mitigation ratios. Fortunately, during final negotiations, water board staff agreed to language making clear that regional habitat conservation plans meeting certain criteria may serve as a watershed plan for the purpose of determining compensatory mitigation.

Although the Procedures' no net loss requirement will drive the amount, type and location of compensatory mitigation in most circumstances, the environmental community was successful in lobbying the SWRCB to include a minimum 1:1 mitigation requirement for streams and wetlands, measured in

length or area. This 1:1 requirement may be satisfied by any form of mitigation (*e.g.*, preservation, enhancement, restoration, creation), although restoration is preferred. To the extent that the 1:1 mitigation provided does not meet the "no net loss" standard, additional mitigation will be required.

Application Requirements

The Procedures' application requirements request much detailed information, which will make it difficult to secure "deemed complete" application status under the Permit Streamlining Act. In addition to the material already required under the RWQCB's Title 23 regulations, applicants must supply 1) state and federal (if any) delineation materials, 2) a detailed project description and an impact assessment down to the nearest hundredth of an acre and lineal foot, and 3) a complete LEDPA analysis. The RWQCBs may also require, among other things, a detailed compensatory mitigation plan and water quality monitoring plan.

A Note on Agriculture

Agricultural interests were heavily involved in development of the Procedures and, in the final few months, were able gain some concessions. These included a procedural exemption for prior converted cropland consistent with federal law and procedural exemptions for certain agricultural features as described in (and roughly paraphrased from) the Obama-era Waters Of The United States regulations, including exemptions for ditches; artificially irrigated areas that would revert to dry land should irrigation cease; and features such as farm and stock watering ponds, irrigation ponds, and settling basins. The rice growers secured additional protective language to limit the potential for unnecessary regulation arising out of the fact that rice farms may exhibit wetland features for substantial parts of the year. Although agricultural interests obtained these procedural exemptions, they were unable to obtain the SWRCB's agreement to exempt farmed areas from the definition of waters of the State. They did stave off, however, rigorous efforts by the environmental community to secure permit requirements for crop conversions in agricultural areas.

Conclusion and Implications

The authors were heavily involved in the final stakeholder negotiations in late 2018 and early 2019, during which the regulated community was able to secure numerous improvements to the Procedures, adding some clarity and filing down a few of the program's pointier teeth. As a result of hard work by staff at the State Water Resources Control Board and stakeholders—particularly the building industry, agricultural and mining interests, water agencies and the environmental community—and despite the frustrations (and occasionally tempers) that arose during those negotiations, the final product was measurably better than the draft circulated in 2017.

Nonetheless, the program will present numerous challenges to the Regional Water Quality Control Boards and project applicants as the Procedures are phased in. Most notable of these are 1) the potential for inconsistencies between the state and federal wetland programs arising out of their different jurisdictional reaches and the agencies' likely differing interpretations of regulatory requirements, even where state and federal regulations have been coordinated; and 2) the lack of resources and training for the RWQCBs to implement the program. Although the SWRCB has promised both additional resources and training, it is the authors' view that the board is vastly underestimating the complexities associated with this new program.

The water agencies and regulated community will have some time to prepare for the "watershed" moment when the Procedures become law. As noted above, the Procedures will not become effective until nine months following review by the Office of Administrative Law. Even then, the SWRCB agreed to language requested by the building industry grandfathering in legitimate (*i.e.*, non-sham) § 401 certification and WDR applications submitted before the effective date, even if those applications are not yet complete. In the meantime, the State Water Resources Control Board's (Board) final resolution directed staff to 1) develop (in coordination with stakeholders) implementation guidance for potential applicants and conduct staff training prior to the Procedures; effective date; and 2) work with stakeholders, other agencies and scientific organizations to develop best practices for preparation of certain climate change analyses required by the Procedures. The resolution

also directs staff to provide periodic progress reports to the State Water Resources Control Board regarding implementation issues, including updates regarding application processing timelines and environmental performance measures.

For more information on the Procedures, *see*, https://www.waterboards.ca.gov/press_room/press_releases/2019/pr04022019_swrcb_dredge_fill.pdf

Postscript: On May 1, 2019, the San Joaquin Tributaries Authority, a coalition of water agencies whose members include the Modesto Irrigation District, Turlock Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, and the City and County of San Francisco, filed suit in the Sacramento Superior Court, against the Procedures, alleging among other things that the Procedures improperly expand the State Water Resources Control Board's jurisdictional reach. It remains to be seen whether and how this litigation will affect the ultimate implementation of the Procedures.

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CALIFORNIA WATER NEWS

SEVEN COLORADO RIVER BASIN STATES AGREE TO NEW ACTION PLAN TO PROTECT VITAL RIVER WATER

In May, state and federal stakeholders in the Colorado River's water supply reached an agreement designed to reduce risks from ongoing and anticipated droughts in the Upper and Lower Colorado River Basins. The Colorado River drought contingency plans for the Upper and Lower Basins reflect years of collaborative effort by state, federal, tribal, and international stakeholders, and are trumpeted as significant cooperative efforts to fortify the Colorado River's water supply against the effects of drought in the basins.

Background

The Colorado River provides a water supply for more than 40 million people and irrigates roughly 5.5 million acres of farmland. The Colorado River Basin, which is divided into an Upper and Lower Basin, spans seven states and extends into Mexico. The Colorado River's water supply is governed by the "Law of the River," which is comprised of numerous federal laws, regulatory guidelines, judicial decisions, agreements, and compacts developed over the course of nearly a century. An important function of this body of law has been federal-state and interstate cooperation in the dam and reservoir operation of the Colorado River, which has become increasingly important as drought conditions impact the river's supply.

In particular, in 2007, the U.S. Department of the Interior (Interior) and seven Colorado River Basin states established a set of temporary guidelines (2007 Guidelines) to address the historic drought plaguing the basin. For the Lower Basin, the guidelines provided for coordinated operations of two major reservoirs—Lake Powell and Lake Mead—and for water allocations among the Lower Basin states in the event of water shortages. Specifically, when Lake Powell's elevation is higher than Lake Mead's, water must be released from Lake Powell. Additionally, the guidelines provided that a shortage would be declared if Lake Mead's elevation dropped to 1,075 feet, at which point Arizona's apportionment of water would decrease from 2.8 million acre-feet to 2.48 million acre-feet. Nevada would also receive less water—287,000 acre-feet compared to 300,000 acre-feet. The guidelines did not establish a scenario in which California would receive less than its 4.4 million acre-feet allotment, but California would not be able to receive deliveries of intentionally created surplus water if a shortage was declared in the Lower Basin.

Also, in 2007, the seven Basin states entered into an Agreement Concerning Colorado River Management and Operations (2007 Agreement). That agreement was designed to improve cooperation and communication among the states, provide additional security and certainty around the Colorado River's supply, and avoid situations giving rise to disputes under the Law of the River. Both the 2007 Agreement and 2007 Guidelines form an important backdrop to the newly signed drought contingency plans for the Upper and Lower Basins (collectively: Plans), which Congress authorized in April and which are governed by a single "companion" agreement.

Drought and the Colorado River

Generally, drought response actions under the Plans will be triggered by projected reservoir levels according to 24-month studies by the U.S. Bureau of Reclamation incorporated into the Plans. The Plans, which expire December 31, 2025, do not override existing guidelines or agreements. Instead, the Plans allow for the development and testing of "tools" designed to provide security and certainty in the Colorado River's water supply. The Upper Basin drought contingency plan (Upper Basin DCP) is aimed at minimizing the risk of Lake Powell falling below a target elevation of 3,525 feet (mean sea level). To do this, the Upper Basin DCP provides for adjustments at the Glen Canyon Dam (*i.e.* Lake Powell), Flaming Gorge Dam, Curecanti, and Navajo Dam in the event of a drought operations response. Volumetric adjust-

ments at Lake Powell will be considered first as part of a drought operation response. At the same time, Glen Canyon Dam operations will be conducted so as to maintain its ability to generate hydropower for other Colorado River system projects and electrical service customers.

For its part, the Lower Basin drought contingency plan (Lower Basin DCP) provides that Lower Basin states will make reductions per the 2007 Guidelines based on projected Lake Mead levels. Additionally, the Lower Basin DCP provides that Lower Basin states will contribute certain water supplies to Lake Mead, again depending on its level. These supplies include intentionally created surpluses, which allow entities in California, Nevada, and Arizona to store water in Lake Mead if they are able to produce an equal amount of water within their state. This results in a water credit, and the credited volume is then delivered from Lake Mead when a surplus is declared. Under the Lower Basin DCP, some of this water may need to be contributed to Lake Mead if levels fall within certain tiered water levels. For instance, if the elevation of Lake Mead drops below 1,045 feet, Arizona, Nevada, and California must contribute 240,000 acre-feet, 10,000 acre-feet, and 200,000 acre-feet, respectively. If projected Lake Mead levels are between 1,045 and 1,090 feet, Arizona would need to contribute 192,000 acre-feet, with Nevada contributing 8,000 acre-feet. California would only need to contribute to Lake Mead levels if they do not exceed 1,045 acre-feet. However, if lake levels fall below 1,030 feet, California would need to contribute 350,000 acre-feet, with Arizona and Nevada contributions set at less than 1,045 foot levels. This arrangement generally appears to reflect the priorities each state has to Colorado River water based on the Law of the River and reflected further in the 2007 Guidelines.

Conclusion and Implications

The drought contingency plan has been widely considered a positive development in the management of the Colorado River water supply. The Plans also reflect a more precise understanding of the hydrological conditions of the Colorado River Basin developed through prior cooperative efforts, such as the 2007 Agreement and 2007 Guidelines. While it is unclear whether the interim drought response tools developed under the Plans will provide long-term solutions to drought conditions along the Colorado River, it is likely that these efforts will advance the parties' understanding of the river, its basin, and their ability to plan for and respond to anticipated drought conditions in the future. For more information, *see:* Interior and States Sign Drought Agreements to Protect Colorado River, available at https://www.acwa.com/news/interior-and-states-sign-historic-drought-agreements-to-protect-colorado-river/
(Steve Anderson, Miles Krieger)

SALTON SEA SPECIES CONSERVATION HABITAT PROJECT CLEARED TO MOVE FORWARD

Declining water levels in the Salton Sea pose significant problems for wildlife and human populations in the surrounding area, due largely to increased water salinity concentration and particulate air pollution from wind erosion of newly exposed lakebed, or "playa." According to the California Natural Resources Agency (CRNA), the situation has developed over the last several decades as a result of a variety of factors, including climate change, agricultural conservation measures, cropping practices and reduced inflows from Mexico. Under the direction of the CRNA, the Salton Sea Management Program (SSMP) is a long-term, multi-phase plan in furtherance of state's obligations under the Salton Sea Restoration Act of 2003 to protect wildlife in the Salton Sea ecosystem and undertake its eventual rehabilitation. Though a variety of factors have hindered the progress of the SSMP to date, construction of the first major component of the SSMP, known as the Species Conservation Habitat Project (SCHP), is set to move forward following the May 2019 approval of an easement by the Imperial Irrigation District (IID) granting the state access to property on which the project will be undertaken.

The Salton Sea Management Program

The SSMP represents perhaps the most comprehensive state effort to revitalize the Salton Sea in the wake of the Salton Sea Restoration Act, following over a decade of disorganized and largely ineffective approaches. The SSMP arose when the Salton Sea Task Force, established by former Governor Brown in 2015, directed the CRNA to formulate a comprehensive, multi-phase plan for the rehabilitation of the Salton Sea ecosystem and to serve as the lead agency with respect to the implementation of the plan. Specifically, the SSMP is focused on the creation and preservation of wildlife habitats across the Salton Sea and the suppression of the spread of dust caused by exposed lakebed. In August 2016, the CRNA reached a key memorandum of understanding with the U.S. Department of the Interior to coordinate State and federal involvement in the ten-year Phase 1 Plan of the SSMP, which includes the SCHP.

Species Conservation Habitat Project

While the Phase 1 Plan features a number of varying elements and strategies, the centerpiece of the plan is the SCHP. The SCHP encompasses approximately 3,770 acres of exposed playa at the southwest end of the Salton Sea near the mouth of the New River, a tributary to the Salton Sea. Consistent with the overarching strategy of the SSMP, the SCHP is intended to limit the spread of airborne dust and cultivate sustainable fish and avian habitats through the construction of a variety of components, which include water management ponds, berms, islands, pump stations, river crossings and intake, access corridors, pipelines and dust suppression elements. An adjacent mixing basin that includes agricultural return flow water and saline water from the Salton Sea will supply the ponds. If successfully implemented, the SCHP will provide substantial support for the viability of similar strategies underlying other major components of the SSMP.

Obstacles to SSMP Implementation

Despite ongoing smaller-scale conservation and restoration efforts directed at the Salton Sea ecosystem, including wetlands projects undertaken by state agencies, the Salton Sea Authority and the Torres Martinez Desert Cahuilla Tribe, a number of obstacles have hindered the broad implementation of the SSMP. A September 2018 report by Audubon California cites complications such as a lack of staff dedicated to the SSMP at the CNRA, Department of Water Resources (DWR) and the Department of Fish and Wildlife. Turnover of personnel working on the SSMP at such agencies has reportedly further limited expertise at the staff level. Additionally, the Audubon report cites coordination inefficiencies among State and local agencies with respect to the SSMP, as well as reduced engagement and commitment at the federal level in the wake of the 2016 election.

Significantly, the implementation of the SCHP in particular has been delayed due to the need for access rights to project area land owned by IID. On May 7, 2019, the Imperial Irrigation District (IID) approved an easement agreement with DWR that will allow construction to begin on the SCHP by granting access to IID-owned lands bordering the Salton Sea. Pursuant to the easement agreement with IID, DWR will be responsible for the costs of the SCHP, as well as the maintenance and operation of the completed project. As a result of the easement agreement, design-build proposals for the commencement of SCHP construction can now be sought. Work on the SCHP is expected to begin this year, and is expected to be completed in 2023.

Conclusion and Implications

The easement agreement with IID represents a notable milestone for the SSMP. Specifically, the ability to move forward with SCHP construction allows for tangible progress to begin on a major scale. Critically, the implementation of the SCHP will also provide essential information to the State regarding the viability and implementation of future SSMP projects. While notable progress appears to be within reach, the full realization of the SSMP will undoubtedly face continued challenges due to the complexity of the undertaking and the multitude of stakeholders involved.

(Wesley A. Miliband, Andrew D. Foley)

SANTA CLARA VALLEY WATER DISTRICT CONSIDERS PURCHASE OF RANCH ABOVE THE MERCED COUNTY SUBBASIN

In late May, Valley Water, formerly known as Santa Clara Valley Water District (Valley Water), held a closed session conference regarding a potential acquisition of certain ranchland in Merced County for a groundwater banking project. Despite uncertainty surrounding the potential deal, Valley Water's potential purchase of land for groundwater banking purposes reflects public agencies' ongoing efforts to better secure water supplies in the face of potential water shortages. Local ranchers, farming interests, and environmentalists, however, have expressed consternation about the potential acquisition, which may generate additional controversy if it moves forward.

Background

Valley Water has expressed interest in certain real property owned by 4-S Ranch LLC and located in Merced County outside the City of Los Banos. The property has only publicly been identified by parcel number. According to assessor parcel information and public letters from the Sierra Club, the portion of 4-S Ranch Valley Water has considered acquiring an interest in totals approximately 5,000 acres. Most recently, Valley Water discussed in closed session the price and terms of payment for an acquisition, although additional public information is currently unavailable.

Valley Water was formed in 1929 as Santa Clara Valley Water District for the purpose of providing flood and storm water control and conservation, and for distributing water within the district's boundaries. Located in Santa Clara County—home to Silicon Valley—Valley Water overlies the Santa Clara and Llagas subbasins. According to Valley Water, groundwater provides nearly half the water used in the county and provides the only source of drinking water for the southern portion of the county. To meet demand, approximately 150,000 acre-feet of groundwater is pumped per year. High annual pumping has created an overdraft condition in the subbasins, prompting the California Department of Water Resources to designate the subbasins as medium and high priority basins, respectively. Because of these designations, the subbasins are subject to the Sustainable Groundwater Management Act (SGMA), which in turn designates Valley Water as the exclusive local agency responsible for managing groundwater pursuant to its provisions. In keeping with its designation as exclusive local agency, Valley Water elected to become a Groundwater Sustainability Agency (GSA) within its boundaries on June 16, 2016. As GSA, Valley Water is responsible for developing and implementing a Groundwater Sustainability Or Alternative Plan (GSP) to achieve the objectives of SGMA; namely, to sustainably manage priority groundwater basins within 20 years of a GSP's implementation.

4-S Ranch overlies the Merced Subbasin of the San Joaquin Valley Groundwater Basin, which has been designated as a critically overdrafted groundwater basin by the California Department of Water Resources. Due to its designation as a critically overdrafted basin, the Merced Subbasin is also subject to SGMA. Most groundwater pumped from the Merced Subbasin is used for agricultural activities. Accordingly, a variety of irrigation and water districts formed a joint powers agency to operate as the GSA responsible for implementing SGMA and a GSP for the Merced Subbasin.

Water Banking and GSPs

Valley Water and the Merced Subbasin GSA are both developing GSPs to sustainably manage their respective groundwater basins. It is thus unclear what impact Valley Water's potential groundwater banking project, if completed, may have on the sustainable management of groundwater within the Merced Subbasin. It is also unclear to what extent Valley Water and the Merced Subbasin GSA would need to coordinate groundwater management efforts to comply with their respective GSPs, and whether any groundwater Valley Water banks in the Merced Subbasin would be subject to the authority of the Merced Subbasin GSA.

Merced County Groundwater Ordinance

These uncertainties aside, Merced County law may present an initial legal obstacle.

In 2015, Merced County enacted a groundwater ordinance preventing the mining and exporting of groundwater within unincorporated areas of the county. In particular, the ordinance prohibits the:

> . . .export of groundwater from inside Merced County outside of the respective groundwater basin in which it originates.

This includes situations where multiple transfers directly or indirectly result in an exportation of groundwater. To the extent 4-S Ranch is located in unincorporated Merced County, any exportation of groundwater from beneath the ranch may be subject to the ordinance.

However, the ordinance makes a number of exceptions to the general prohibition on exporting groundwater, including an exception for groundwater exportation pursuant to a permit issued by the Merced County Department of Public Health, Division of Environmental Health. Additionally, the ordinance excepts groundwater recharge that improves groundwater conditions, although this exception limits the amount of extraction and exportation to the amount of water used to recharge the groundwater basin. The ordinance also excepts the export of groundwater "reasonably necessary to support Federal, State, and County approved public works projects and maintenance activities." This latter exception may include the federal Central Valley Project and California State Water Project—both of which are sources that supply Valley Water. In any event, it is likely that a groundwater banking project by Valley Water may need to navigate Merced County's prohibition on water exportation, should the banking project ever move forward.

Conclusion and Implications

At this stage, it is highly speculative whether Valley Water will continue to pursue acquiring an interest in 4-S Ranch for a groundwater banking project. If Valley Water perseveres, it may encounter legal and political obstacles, but it is unclear to what extent those may significantly interfere with the groundwater banking project. What is clear is that groundwater banking continues to provide an attractive and potentially efficient means for public agencies to secure water supplies to account for future climatic, legal, and political uncertainty. For more information, *see:* Santa Clara Valley Water District, May 28, 2019 Board Agenda, available at: https://scvwd.legistar.com/LegislationDetail.aspx?ID=3954105&GUID=D80D6B74-FE30-4B9A-ADD0-85913C3DC4A5
(Steve Anderson, Miles Krieger)

U.S. DROUGHT MONITOR BRIEFLY REPORTS NO SIGNIFICANT DROUGHT CONDITIONS NATIONWIDE, FIRST TIME IN TWENTY YEARS

For the first time in over 20 years, the U.S. Drought Monitor recently reported finding no significant drought conditions at any location in the contiguous United States. Crediting a wet winter and sustained wet spring conditions, the report was welcome news, particularly coming on the heels of all-too-recent memories of exceptional drought conditions that gripped California and other Western States.

Background

Since approximately the year 2000, the Drought Monitor has released weekly maps depicting areas of the United States, and areas of individual States, experiencing drought conditions. The Drought Monitor is produced jointly by the National Drought Mitigation Center (NDMC) at the University of Nebraska-Lincoln, the National Oceanic and Atmospheric Administration (NOAA), and the U.S. Department of Agriculture (USDA). The Drought Monitor is not a forecast; rather, it provides a weekly assessment of drought conditions based on current data.

The Drought Monitor utilizes five classifications, namely:

> D0 – Abnormally Dry, showing areas that may be going into or are coming out of drought. The Drought Monitor describes examples of possible impacts of D0 to include short-term dryness that slows planting or growth of crops, and when coming out of drought, crops that do not fully recover.
>
> D1 – Moderate Drought, with examples of possible impacts including some damage to crops, lowered stream, reservoir and well levels, developing or

imminent water shortages and voluntary water-use restrictions.

D2 – Severe Drought, with examples of possible impacts including likely crop losses, water shortages and the imposition of water use restrictions.

D3 – Extreme Drought, typically resulting in major crop losses and widespread water shortages or restrictions.

D4 – Exceptional Drought, typically resulting in exceptional and widespread crop losses and shortages of water in reservoirs, streams and wells creating water supply emergencies.

The Drought Monitor defines drought primarily on the basis of lack of precipitation. As summarized on the Drought Monitor website:

It is not a statistical model, although numeric inputs are many: the Palmer Drought Severity Index, the Standardized Precipitation Index, and other climatological inputs; the Keech-Byram Drought Index for fire, satellite-based assessments of vegetation health, and various indicators of soil moisture; and hydrologic data, particularly in the West, such as the Surface Water Supply Index and snowpack. The [Drought Monitor] relies on experts to synthesize the best available data from these and other sources and work with local observers to interpret the information. The USDM also incorporates ground truthing and information about how drought is affecting people, via a network of more than 450 observers across the country, including state climatologists, National Weather Service staff, Extension agents, and hydrologists.

Regulatory Responses to Drought

The NMDC correctly acknowledges that:

No single federal agency is in charge of water or drought policy; response and mitigation fall to an assortment of federal authorities. . . .The National Drought Resilience Partnership, launched in the aftermath of widespread drought in 2012, is an effort to unify federal drought response and policy. Drought response efforts, planning, and water law vary from state to state.

The NMDC recommends that state, local, tribal and basin-level water managers adopt an operational definition of drought for their own circumstances and incorporate local data to inform drought response measures.

California and Drought

Since the year 2000 when the Drought Monitor began, the longest duration of drought conditions in California, ranging from D1 to D4 at any location in the state, lasted 376 weeks from December 2011 until March 2019. At peak intensity in late 2014, the Drought Monitor reported D4 Exceptional Drought conditions affecting geographically nearly 60 percent of California. The record-breaking California Drought prompted then-Governor Jerry Brown's historic drought emergency declarations, first-ever statewide emergency water use regulations, first-ever statewide groundwater management legislation and a host of other first-ever water law and policy changes. Drought conditions also prompted Colorado River managers and stakeholders to negotiate and reach historic drought contingency agreements.

Conclusion and Implications

The recent Drought Monitor map observing an absence of drought conditions nationwide punctuates the whiplash experienced by California and other Western States going from sustained drought to intense bursts of precipitation. Though a helpful and informative tool, the Drought Monitor acknowledges that drought conditions are more accurately defined and felt at a local level and can change quickly. Furthermore, while sporadic bursts of precipitation may boost short-term and seasonal water supplies, groundwater basin conditions generally require much more time and active management to recover from increased pumping during sustained drought conditions. For more information, *see:* https://droughtmonitor.unl.edu
(Derek Hoffman, Michael Duane Davis)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION REVIVES PLAN TO RAISE SHASTA DAM

Since the 1980s, Shasta Dam has been a focal point in debates for increasing the state's water storage capacity. In 2014, such a proposal initially led nowhere when the U.S. Bureau of Reclamation (Bureau) studied the potential impacts of raising the dam by 18.5 feet, finding that such a project could have adverse effects on the McCloud River, violating the state's Wild and Scenic Rivers Act (WSRA). With newfound wind in its sails under the current federal administration, however, the Bureau has revived its interest in raising Shasta Dam by teaming up with Westlands Water District (Westlands). Welcomed by a storm of opponents seeking to prevent the project from going forward, the Bureau and Westlands now find themselves in a legal battle to keep the project from sinking.

Background

Decades in the making, the Bureau's Shasta Dam and Reservoir Enlargement Project (Project) began to take off in 2014 when the Final Environmental Impact Statement for the Shasta Lake Water Resources Investigation (FEIS) was completed. The FEIS analyzed the benefits and environmental impacts of raising the Shasta Dam by varying heights, ranging from 6.5 to 18.5 feet, and acted as an important step for the Bureau in fulfilling its obligations under the National Environmental Policy Act (NEPA).

The Bureau considered the potential impacts of the Project on the McCloud River, specifically looking at the transition reach of the McCloud Arm of Lake Shasta into the Lower McCloud River. In this analysis, the Bureau determined that if the Project were to be implemented, the transition reach would be increased by about 3,550 feet, extending 39 percent further up the McCloud than the current transition reach and absorbing 3 percent of the river from the McCloud Dam to Lake Shasta.

Based on these findings, the Bureau concluded that the Project would have a "potentially significant" impact on the wild trout fishery located on the McCloud River and a "significant and unavoidable" impact on the free-flowing condition of the McCloud. Additionally, the FEIS acknowledged that these impacts would conflict with the WSRA.

Despite the extensiveness of the FEIS and its accompanying Final Feasibility Report for the Project, no Record of Decision was made and there was no official recommendation.

No further major action was taken until March of 2018 when Congress granted $20.5 million to the Bureau for design and pre-construction activities for the Project, at which point The Bureau began negotiations with Westlands for a cost-share agreement.

In November of 2018, Westlands issued its Initial Study and Notice of Preparation for the Project and announced that it would be serving as the Lead Agency for review under the California Environmental Quality Act (CEQA) in preparing an Environmental Impact Report (EIR). In December, Westlands held a public scoping hearing in Redding and in January accepted written comments regarding the Initial Study.

The Complaint Against Westlands in California Superior Court

On May 13, 2019, several environmental groups (collectively: plaintiffs) filed suit in California Superior Court in Shasta County, alleging that Westlands' cooperation and assistance in the Project violates the WSRA and seeking declaratory and injunctive relief on the matter.

Created in 1972 to protect listed rivers in California by preserving their free-flowing state and their immediate environments, the WSRA established a list of rivers throughout California, chosen for their "extraordinary scenic, recreational, fishery, or wildlife values." In 1989, the WSRA was amended to add § 5093.542, which gave the McCloud River a protected status.

Although not specifically listed among the other rivers protected by the WSRA, § 5093.542 declares that:

> . . .the McCloud River possesses extraordinary resources in that it supports one of the finest wild trout fisheries in the state. . .[and that]. . .maintaining the McCloud River in its free-flowing condition to protect its fishery is the highest and most beneficial use of the waters of the McCloud River.

Additionally, § 5093.542(c) prohibits state agencies from assisting or cooperating with any government agency:

> . . .in the planning or construction of any dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery.

Using the WSRA as the spearhead for their suit, plaintiffs' cause of action alleges that: (1) Westlands is a state agency, (2) Westlands is assisting and cooperating with a federal agency (the Bureau) in the Project, (3) the Project could have an adverse effect on the free-flowing condition of the McCloud River and its wild trout fishery, and ultimately, and (4) Westlands is acting is violation of the WSRA.

Conclusion and Implications

The Bureau of Reclamation does have to comply with the federal Water Infrastructure Improvements for the Nations Act, which requires that the Bureau secure a non-federal cost-share partner to cover at least 50 percent of the Project funding. Accordingly, the Bureau would still need a local partner to split the costs of the Project, whether Westlands or a different agency.

In the event plaintiffs' challenge is successful, the Bureau of Reclamation will need to find a new, non-state agency cost-share partner, slowing the progress of the Project significantly. Until and unless that happens, however, Westlands and the Bureau have set their schedule to begin construction for the Project by December, 2019.
(Wesley A. Miliband, Kristopher T. Strouse)

FACING SEA LEVEL RISE, CALIFORNIA COASTAL COMMISSION TESTS POWERS FOR 'MANAGED RETREAT' OF HOMES ALONG THE COASTLINE

The California Coastal Commission (Commission)is charged with protecting the state's beaches from the effects of overdevelopment. Yet with climate change projections predicting rising sea levels over the coming decades, the Coastal Commission is considering how best to approach the changing coastline in years to come. One option may result in the removal of beachfront residential homes, though the possibility may be at the limits of the Coastal Commission's authority.

Background

The Commission oversees development on over 1,100 miles of coastal land, possessing the authority (sometimes shared with local jurisdictions) to approve or deny the construction of any project within the Coastal Zone. Created in 1972 pursuant to Proposition 20, and endowed with this authority through the 1977 California Coastal Act, the Commission is charged with preserving public access to beaches. Recent estimates indicate that rising sea-levels could eliminate two-thirds of state beaches before 2100, with researchers for the U.S. Geological Survey describing rising oceans as a greater threat to the California economy than wildfires or extreme earthquakes. Effects are estimated to materialize as early as 2040.

In response, the Commission has expressed a desire for beach cities and coastal counties to create proactive plans to address climate impacts. One such plan could force homeowners to abandon beachfront homes. In addition to single-family residences, coastal infrastructure including wastewater treatment facilities, pipelines, highways and railroads may be at risk from rising sea levels. Yet the ability for the Commission to mandate that homes be abandoned to accommodate public access to changing coastlines has yet to be tested in the courts. The full authority of the Commission will need to be litigated to determine whether the agency can put limits on seawalls, and

how far it may be able to go with actions that could undermine property values or render some homes unlivable in the medium term.

Upcoming Coastal Commission Hearings

The agency plans to hold hearings in July on proposed language for managing sea-level rise in residential areas, and expects to adopt a "Residential Adaptation Guidance" by the end of the year. The most recent draft details several options, including "managed retreat" which would remove homes so beaches can migrate inland rather than disappearing under the rising water. The "managed retreat" proposal already faces fierce opposition from local governments, homeowners, and the real estate industry, with the California Association of Realtors opposing the suggestion that cities create hazard zones as a first step towards a "managed retreat." Those zones would likely negatively impact property values, and could make obtaining insurance more difficult for homeowners. It may even make selling the homes more difficult.

"Managed retreat" is only one of the options being included in the upcoming Guidance, though it has understandably taken much of the focus leading up to the hearings. The Commission does not claim the authority to force the removal of any private homes, but instead hopes to encourage local governments to create and implement plans that will protect beaches against the encroaching ocean.

Cities and counties with land in the Coastal Zone have oversight authority as well under the Coastal Act, and are intended to create local coastal programs to manage development near the coastline. Cities with approved plans have primary authority to decide whether to issue new permits for development, though the Commission can challenge permits if it believes they do not comply with the Coastal Act.

Opponents of the "managed retreat" strategy argue it would amount to a taking of private property, and should be accomplished through eminent domain rather than any local or statewide policy harming the property value of coastal residences. Yet taking a property through eminent domain requires paying the homeowner fair market value, and the value of a home which may soon be harmed due to rising sea levels may be increasingly questionable in the years to come.

Yet other options favored by local governments to date—including dumping sand on beaches to combat higher ocean levels—only work in the short term and serve only to delay the inevitable. The Commission's first guidance on sea-level rise was released in 2015, and told cities and counties of the need to address the issue in planning and permitting decisions. To date, local efforts have not been sufficient to assuage the Commission's concerns.

Sea Walls Reduce Access but Fail to Combat Sea-Level Rise

One of the primary issues in recent years has been the propagation of sea walls. In 1971, walls existed on roughly 7 percent of beaches in Ventura, Los Angeles, Orange and San Diego counties. By 1998, that number grew to 33 percent, and in 2018 it reached 38 percent, based on research conducted by California State University, Channel Islands. In response, the Commission has tightened policies permitting sea walls, now limiting walls to homes built before 1977, when the Coastal Act took effect. Homes built before that year which undergo major redevelopment are also considered new and must waive their right to a sea wall to obtain Commission approval.

Conclusion and Implications

The California Coastal Commission faces great opposition to its proposed "managed retreat" policies in the forthcoming "Residential Adaptation Guidance." While pushback is inevitable, the limits to the Commission's authority remain unknown until challenged in court. Rising sea levels also alter the Commission's jurisdiction, which covers the Coastal Zone, or the area extending inland roughly 1,000 yards from the mean high tide line. As sea levels rise, the Coastal Zone will move further inland, and the Commission's authority will travel with it. As the ocean moves inland, public access is required to do the same, with inevitable effects on private property. How the Commission, and the local jurisdictions it must work alongside, will handle these shifts may completely alter the way we think about public access to beaches and private property along the coastline.
(Jordan Ferguson)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA SENATE PASSES THE CALIFORNIA ENVIRONMENTAL, PUBLIC HEALTH, AND WORKERS DEFENSE ACT OF 2019

On May 29, 2019, the California Senate passed Senate Bill 1, the California Environmental, Public Health, and Workers Defense Act of 2019 (SB 1). SB 1 aims to protect California's public health, safety, and environment in the event that the federal government weakens or repeals certain environmental laws and regulations. SB 1 prohibits California standards from falling below defined "baseline federal standards," and allows citizen suits to enforce standards pursuant to this bill.

Background

The federal Clean Air Act (CAA), Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Endangered Species Act (ESA), Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA) and the Federal Coal Mine Health and Safety Act (Coal Act) were enacted to protect public health, safety, and welfare. Recently, however, the Trump administration has signaled intent to reduce or lower standards set by these statutes. President Trump's position is that these laws, and their associated regulations, threaten U.S. economic growth.

Supporters of SB 1, on the other hand, believe reducing standards under these statutes will jeopardize California's public health, safety, and environment. Accordingly, SB 1 proposes to allow California to retain standards under the CAA, CWA, SDWA, ESA, FLSA, OSHA, and the Coal Act. In general, under existing federal law, states can implement and enforce these federal statutes so long as the state's law is at least as stringent as the federal law. In other words, the federal standards act as a "floor," and states can impose more stringent requirements.

SB 1 is not the first of its kind in California. In 2003, California enacted SB 288 which established the Protect California Air Act of 2003. SB 288 is similar to SB 1 in that (1) California enacted SB 288 after the federal government altered the CAA's New Source Review program, in effect reducing federal air quality standards, (2) SB 288 was intended to protect human health and welfare from any adverse effects of such federal change, and (3) SB 288 prohibits air quality management districts in California from modifying their New Source Review rules to be less stringent than those in effect on December 30, 2002, except under certain circumstances. SB 1 parallels these components of SB 288, but is much broader.

California Senate Bill 1

The stated purpose of SB 1 is to protect California's people, environment, and natural resources. If the President or Congress reduces or repeals federal standards under the CAA, CWA, SDWA, ESA, FLSA, OSHA, or the Coal Act, SB 1 prohibits California from following suit. SB 1 defines certain "baseline federal standards" and forbids California standards from falling below those baselines. The baseline federal standards are federal regulations implementing the above statutes in effect as of January 2020.

To implement this rule, SB 1 imposes a state-mandated local program with several key provisions. The "listed agencies" involved are the State Air Resources Board, the State Water Resources Control Board, the Fish and Game Commission, the Occupational Safety and Health Standards Board, and the Department of Industrial Relations.

First, SB 1 requires listed agencies to regularly assess proposed and final changes to the "baseline federal standards."

Second, if an agency deems a federal change after January 2017 less protective of public health, the environment, or worker health or safety, SB 1 requires the agency to consider adopting the baseline federal standard. Since SB 1 requires California to retain standards at least as stringent as the baseline federal standards, adopting such standard ensures compliance.

Third, if an agency decides to adopt baseline federal standards, they may do so after a 30-day comment period by one of two methods: 1) emergency regulation, or 2) promulgation or amendment of a state policy, plan, or regulation.

Finally, SB 1 authorizes any person acting in the public interest to bring action to enforce standards pursuant to this bill, provided simple procedural

requirements are met.

To summarize, SB 1 prohibits California standards pursuant to the CAA, CWA, SDWA, ESA, FLSA, OSHA, and the Coal Act from being less stringent than "baseline federal standards." To achieve this objective, SB 1 places new duties on several local agencies and contains a citizen suit provision.

Conclusion and Implications

The California Senate passed SB 1 on May 29, 2019 and it currently awaits consideration by the Assembly. Groups in favor of SB 1 include Environmental Defense Fund, Natural Resources Defense Council, Defenders of Wildlife, and The Nature Conservancy. Arguments in support include the need to safeguard California against the impacts of climate change and catastrophic injuries to workers. Opposition groups include the Agricultural Council of California, the Association of California Water Agencies, the California Chamber of Commerce, and the Western Growers Association. Those in opposition state concern over the bill's broad and vague language. They oppose the proposal that agencies can bypass traditional notice and comment procedures when adopting federal baseline regulations. Opposition groups also state concern that SB 1 will negatively impact growth, employment, and investment. The text of SB 1, along with its legislative history, is available at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1
(Holly Tokar, Meredith Nikkel)

CALIFORNIA LEGISLATORS REJECT WATER TAX BUT APPROVE FUNDING FOR SAFE AND AFFORDABLE DRINKING WATER

California lawmakers recently approved and presented to Governor Gavin Newsom a $214.8 billion California budget with new spending for safe and affordable drinking water. Lawmakers rejected Governor Newsom's initial proposal to impose a water tax, pursuing instead a compromise to appropriate over $130 million of existing tax revenue for improvements to the drinking water systems and supplies.

Background

Several funding proposals were introduced earlier this year to support safe and affordable drinking water supplies particularly for disadvantaged communities in California. Governor Newsom's January and May budget proposals included a controversial water tax ranging from 95 cents to $10 a month on water customer bills in order to raise approximately $140 million annually for a proposed "Safe and Affordable Drinking Water Fund (SADWF)."

The California Assembly and Senate simultaneously juggled many other bills aimed to fund and support clean and reliable drinking water in areas of high need throughout the state. Examples included Assembly Bill 217 (Garcia) and Assembly Bill 134 (Bloom), which proposed creating a safe drinking water fund to be financed through taxes on various agricultural interests, livestock, fertilizers, and local water systems. Examples of Senate proposals included Senate Bill 669 (Caballero) to create a water trust fund using General Fund appropriations, and Senate Bill 200 (Monning) to creates and implement a safe drinking water fund but without specifying a funding source.

A Compromise Result

On May 22, 2019, the California Senate Budget Subcommittee voted 37-1 to reject Governor Newsom's proposed water tax. Both Republican and Democratic lawmakers were hesitant to implement a new tax in light of the state's projected surplus of $21.5 billion. The Senate instead recommended an alternative proposal to appropriate money from existing tax dollars to finance the Safe and Affordable Drinking Water Fund. The proposal included funding from other bills and laws including Proposition 1 and Proposition 68 to fund various projects to strengthen water delivery systems.

Following extensive negotiations, the legislature approved in early June and sent to Governor Newsom a $214.8 billion state budget including more than $130 million for clean water projects funded primarily from the Greenhouse Gas Reduction Fund which derives proceeds from the sale of greenhouse gas emission credits.

> In the 201920 budget plan, the administration proposes to establish the SADW program to increase access to safe drinking water for Californians. Similar to last year's proposal, the program would provide certain local water agencies—particularly ones in disadvantaged communities—with grants, loans, contracts, or services to help support their O&M costs. This funding would be supported by new charges proposed by the Governor on water system ratepayers, fertilizer sales, and certain agricultural entities. For 201920, the administration requests $4.9 million General Fund in onetime funding for state administration costs at the SWRCB and CDFA to begin implementation of the program. Below, we provide additional details about key aspects of the administration's proposal. (LAO Office Analysis of the 2019-2020 California Budget).

The breakdown of funding sources, are summarized as follows:

> In total, the administration estimates that the various proposed charges would generate roughly $110 million to $140 million annually when fully implemented. Charges on fertilizer and agricultural entities would sunset 15 years after they go into effect. Specifically the administration proposes budget trailer legislation to implement the following charges:

Charge on Water System Customers ($100 Million to $110 Million). Beginning July 2020, the administration proposes imposing monthly charges on most water system customers ranging from $0.95 to $10 per month based on the size of the customers' water meter. According to a recent report by a private consulting firm, the average monthly residential water bill across the state typically falls between $40 to $80. SWRCB estimates these charges would generate between $100 million and $110 million annually when fully implemented. Beginning July 2022, SWRCB could reduce the amount consumers are charged. Customers would be exempted from the charges if (1) they selfcertify that their household income is equal to or less than 200 percent of the federal poverty level ($25,100 for a family of four in 2019) or (2) receive service from a water system with fewer than 200 connections. Local water systems would be authorized to retain 4 percent of the revenue to cover costs associated with the collection of the charges until July 2022 when the amount the water systems could retain would decline to 2 percent.

Fertilizer Mill Fee ($14 Million to $17 Million). The administration proposes a mill fee of six "mills" (equal to sixtenths of a cent) per dollar on the sale of fertilizer. This would be in addition to the current mill fee of three mills. This fee would go into effect upon enactment of the budget trailer legislation. According to CDFA, this charge is estimated to generate $14 million to $17 million per year when fully implemented.

Charges on Milk Producers ($5 Million). The administration proposes to impose charges on milk producers beginning January 2022. In total these charges are estimated to generate $5 million per year when fully implemented. We note that the dairy industry in California generated $6.6 billion in cash receipts in 2017.

Charge on Confined Animal Facilities (Amount Not Estimated). Beginning January 2022, the administration proposes to impose a charge on confined animal facilities—excluding dairies—such as poultry and other livestock operations. A workgroup would be convened by the administration to establish a charge commensurate with the risk to groundwater confined animal facilities create by discharging nitrates. The charges are capped at $1,000 per facility. (Ibid)

Some environmental advocates have described the comprise budget bill's use of the Greenhouse Gas Reduction Fund as asking Californians to choose between clean water and clean air. In response, Governor Newsom has asserted that while money from the cap-and-trade programs are legally required to be spent on projects to reduce the greenhouse gases responsible for global warming, the lack of clean drinking water in various locations throughout the state results in increased carbon emissions from transporting bottled water to those communities.

Conclusion and Implications

The legislature finds that each year, more than one million Californians lack access to clean drinking water. As of the time of this writing, lawmakers were

finalizing details of the Fiscal Year 2019-2020 budget legislation, including through developing trailer bills. The compromise proposal avoids the controversial imposition of a water tax, which may be among its most compelling qualities from the perspective of the many urban water suppliers that would have been burdened with collecting such a tax. An analysis by the California Legislative Analyst's Office of the water related portions of Governor Newsom's 2019 budget is available online at: https://lao.ca.gov/Publications/Report/3933#Water
(Paula Hernandez, Michael Duane Davis)

LAWSUITS FILED OR PENDING

DISTRICT COURT DISMISSES CLEAN WATER ACT CLAIMS AGAINST CITY OF SEATTLE—ALLOWS OTHER COUNTERCLAIMS TO MOVE FORWARD IN PCB CONTAMINATION CASE

The U.S. District Court for the Western District of Washington recently dismissed Monsanto Company's federal Clean Water Act (CWA), unjust enrichment, and contribution counterclaims against the City of Seattle. Monsanto's federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and negligence counterclaims are allowed to move forward. [*City of Seattle v. Monsanto Co.*, ___F.Supp.3d___, Case No. 2:16-CV-107-RSL (W.D. Wash. May 3, 2019).]

Factual and Procedural Background

From 1946 to 1986, Monsanto owned and operated a plant that manufactured adhesives and vanillin on a site adjacent to the Lower Duwamish River. Monsanto manufactured polychlorinated biphenyls (PCBs) in the United States, including at this plant, until the 1970s. The PCBs contaminated Seattle, Washington's drainage systems, storm water, and other bodies of water. In 1979 Congress banned the manufacture of PCBs by enacting the Toxic Substances Control Act.

Seattle has various types of drainage systems that collect storm water and sewage. During heavy rains the system overflows and discharges into surrounding waterways. In 2013, the United States and the State of Washington (Washington) jointly sued Seattle for violating the CWA and the Washington Water Pollution Control Act. The consent decree at the end of the suit required Seattle to reduce its overflows and pay a civil penalty of $350,000.

In 2016 the City of Seattle filed a complaint against Monsanto. Seattle alleged that Monsanto, as the sole manufacturer of PCBs in the United States, was responsible for the presence of PCBs in city waters. Seattle brought five claims against Monsanto, and Monsanto filed a motion to dismiss. The court dismissed Seattle's defective design, failure to warn, and equitable indemnity claims, but Seattle's public nuisance and negligence claims went forward.

Monsanto then brought six counterclaims and asserted 90 affirmative defenses. Monsanto's counterclaims included two CERCLA claims, a CWA claim, a negligence claim, an unjust enrichment claim, and a contribution claim. Seattle moved to dismiss all six counterclaims under Federal Rule of Civil Procedure 12(b)(6), and moved to strike fifteen of the affirmative defenses.

The District Court's Decision

Clean Water Act Counterclaims

Seattle first argued that Monsanto lacked standing because it "lumped" together approximately 31 CWA counterclaims. The court set aside this argument and deemed Monsanto's generalized allegations sufficient for the pleading stage. Seattle then argued that Monsanto lacked standing for its CWA counterclaims, focusing primarily on causation and redressability. Seattle succeeded in both of these arguments and the court dismissed Monsanto's CWA counterclaims.

On the causation front, Seattle argued the injuries alleged by Monsanto were due to actions by the U.S. Environmental Protection Agency (EPA) and Washington: the EPA determined Monsanto was a "Potentially Responsible Party" under CERCLA, and Washington decided to sue Monsanto. Monsanto argued that Seattle's activities in violation of the CWA resulted in the discharge of pollutants into the "Affected Water Bodies," which in turn caused the EPA and Washington to take actions against Monsanto. The court opined it was "speculative to hold that Seattle's compliance with the CWA would have prevented the EPA from issuing its Notice or Washington from suing Monsanto." The independent decisions of the EPA and Washington were sufficiently uncertain to break the chain of causation.

On the redressability front, Seattle convinced the court that this counterclaim would not redress Monsanto's past costs because the CWA only allows pay-

ment of civil penalties to the United States Treasury. Further, the court opined that even if an injunction or civil penalties were granted in this lawsuit, Monsanto's future defense costs and liabilities would not be redressed because they would have no bearing on Seattle's prosecution of this lawsuit or Washington's prosecution of its lawsuit. Lastly, the court opined that Monsanto could recover its future response costs through its CERCLA counterclaims.

CERCLA Counterclaims for Costs

Monsanto argued it was entitled to recover costs from Seattle under CERCLA. Seattle challenged this CERCLA counterclaim by arguing Monsanto's response costs were not "necessary." The court determined Monsanto made out a plausible CERCLA claim.

First, the court explained that the touchstone for determining the necessity of response costs is whether there is an actual threat to human health or the environment. The court then opined that, accepting Monsanto's allegations as true, Seattle's activities generated such a threat. Second, even though the EPA had already been cleaning up the Lower Duwamish Waterway Superfund site, the court refused to declare Monsanto's extra efforts duplicative and unnecessary at this stage. "The question whether a response action is necessary … is a factual one to be determined at the damages stage."

Seattle also argued that § 122(e)(6) of CERCLA bars Monsanto from recovering its costs because remedial actions are barred at facilities where a remedial investigation and feasibility study take place. Monsanto responded that even though this section may bar it from recovering costs at the Lower Duwamish Waterway Site, where a remedial investigation and feasibility study have taken place, it still incurred costs outside the geographic boundary of that site that are recoverable. The court concluded it is plausible that Monsanto had some recoverable costs outside the Lower Duwamish Waterway Site, therefore it would be premature to dismiss the counterclaim.

Negligence Counterclaim

Seattle challenged Monsanto's negligence claim by arguing Seattle had no duty to Monsanto. Monsanto alleged Seattle had duties with regard to the operation of wastewater treatment system and sewer systems, construction activities, and the operation and maintenance of its own properties.

The question of whether a municipality owes a duty rests on whether or not the incident was foreseeable. The court held that, at this stage, Monsanto plausibly alleged it was foreseeable to Seattle that a person or entity would eventually need to address its contamination of the water bodies at issue. Seattle failed to eliminate Monsanto's negligence claim at this time.

Unjust Enrichment Counterclaim

The court dismissed Monsanto's unjust enrichment claim because it was contingent on Seattle prevailing in this action. The court stated that other mechanisms, like contributory fault, are better suited to allocate fault, and that Monsanto cannot assume that a court judgment on damages would be unjust and inequitable.

Contribution Counterclaim

The court dismissed Monsanto's contribution claim because a defendant cannot bring a claim for contribution against a single plaintiff that may secure a judgment against it. The court stated that "the right of contribution is limited to parties who have been held jointly and severally liable for the plaintiff's injury."

Conclusion and Implications

The court's decision to dismiss some, but not all, of Monsanto's counterclaims means Monsanto will be allowed to pursue superfund and negligence claims related to PCBs that Monsanto manufactured and discharged to Seattle's sewer systems. This case also shows that such counterclaims cannot proceed under the CWA where the claim is only causally attenuated to the injury. https://cases.justia.com/federal/district-courts/washington/wawdce/2:2016cv00107/226478/116/0.pdf?ts=1556961701
(William Shepherd, IV; Rebecca Andrews)

RECENT FEDERAL DECISIONS

DISTRICT COURT SETS ASIDE FEMA'S EVALUATION OF NATIONAL FLOOD INSURANCE PROGRAM UNDER THE FEDERAL ENDANGERED SPECIES ACT

Ecological Rights Foundation et al. v. Federal Emergency Management Agency, ___F.Supp.3d___, Case No. 17-cv-02788-JD (N.D. Cal. May 15, 2019).

In May 2019, the U.S. District Court for the Northern District of California set aside the Federal Emergency Management Agency's (FEMA) determination that the National Flood Insurance Program (NFIP) was not likely to adversely affect endangered or threatened (listed) species or critical habitat under the federal Endangered Species Act (ESA). The opinion by Judge Donato reinforced FEMA's ESA obligations and highlighted FEMA's potential to affect listed species.

Background

FEMA provides individuals in participating communities with federal flood insurance policies through NFIP. FEMA's responsibilities include: ensuring participating communities implement flood risk reduction measures, adopting a regulatory floodway, and publishing updated flood maps.

The ESA § 7(a)(2) obliges federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) to ensure that agency actions will not affect listed species. In three different jurisdictions environmental organizations sued FEMA to enforce § 7(a)(2) responsibilities on NFIP-related action and prevailed. The U.S. District Courts for the Western District of Washington, Eastern District of California, and the Eleventh Circuit Court of Appeals have each held that administering NFIP is a federal agency action subject to § 7(a)(2). *Coalition for a Sustainable Delta v. FEMA*, 812 F.Supp.2d 1089 (E.D. Cal. 2011); *Nat'l Wildlife Fed'n v. FEMA*, 345 F.Supp.2d 1151 (W.D. Wash. 2004); *Florida Key Deer v. Paulison*, 522 F.3d. 1133 (11th Cir. 2008).

In November 2016, FEMA prepared a biological evaluation (Evaluation) to assess NFIP's potential effects on listed species and determine whether formal consultation was necessary. FEMA's Evaluation states that it analyzed the entirety of the United States as its action area. Instead of focusing on specific species, it addressed species and habitats generally in broad categories. The Evaluation concluded that NFIP would have no effect on any listed species or its critical habitat on a national basis.

Conservation organizations, Ecological Rights Foundation and Humboldt Baykeeper (plaintiffs), initiated an ESA citizen suit. Plaintiffs asked that the Evaluation be set aside because FEMA did not consider the impact of NFIP and related floodplain development on listed species in Humboldt, Monterey, and Santa Cruz counties. Both plaintiffs and FEMA filed cross motions for summary judgment.

The District Court's Decision

The main issue was whether FEMA's Evaluation was arbitrary and capricious because it failed to consider the impacts of potential floodplain development on listed species. FEMA advanced various arguments to defend the Evaluation; however, the District Court rejected each of them and rendered the administrative record incomplete.

FEMA Authority to Issue Permits

FEMA argued that because it does not have authority to issue permits for local development, there was no federal action that would trigger § 7(a)(2). The court rejected that argument because "FEMA's effort to pigeonhole floodplain development solely as a matter of state and local permits is untenable in light of" FEMA's involvement in floodplain management and development through NFIP. *Ecological Rights Foundation*, 2019 WL 2124337, at *7. The court determined that FEMA makes discretionary decisions about how floodplains are managed in its administration of NFIP. Moreover, FEMA's Evaluation contended that floodplains provide a number of

ecological and aesthetic functions, including habitat for listed species. FEMA takes such ecological functions into account when adjusting insurance premiums. Therefore, the court found that FEMA "artificially truncate[d] the scope of its actions" and its involvement prompted § 7(a)(2) consideration. *Id.*

Applicability of Section 7(a)(2)

FEMA next argued that § 7(a)(2) did not apply because NFIP itself does not cause floodplain development. The court characterized this argument as "the product of an unduly myopic view . . . ." *Id.* The court reasoned that actions with any chance of affecting a listed species required some form of consultation, whether formal or informal. FEMA attempted to show reports that NFIP does not encourage development by citing studies by the Government Accountability Office and the American Institutes for Research. However, the court discredited these reports because of conflicting conclusions, outdated research, and poor geographic comparisons.

Rejection of Previous Consultations

The court also criticized FEMA for "ignoring evidence[.]" *Id.* at *8. Previous FWS and NMFS consultations regarding NFIP administration indicated that NFIP would have an adverse effect on listed species. The fact that FEMA did not address this in the Evaluation was "a substantial and damaging omission." *Id.*

Local Factors

Finally, the court was not persuaded by FEMA's attempts to justify the Evaluation. The court found that using one evaluation to cover the entire United States prevented FEMA from considering important local factors. A broad-based national evaluation could not:

> . . .ever hope to be genuinely useful or true to Congress' mandate to protect species and habitats in their local environments. *Id.*

Effects that Triggered the Need for a Consultation

Additionally, the Evaluation highlighted potential benefits that NFIP could have on listed species and habitat. The court regarded such benefits as effects that trigger consultation.

The court set the Evaluation aside, held the administrative record incomplete, and encouraged FEMA to reconsider consultation. The court allowed plaintiffs 45 days to file for an injunction, if necessary. However, on June 6, 2019, the court granted a joint request to stay the case until September 6, 2019. The new date by which plaintiffs must file for an injunction is November 14, 2019.

Conclusion and Implications

This opinion emphasized that FEMA must make the requisite ESA considerations when administering NFIP. While FEMA denied that it plays a role in local land use decisions, the court rejected that point of view and concluded that as a practical matter the NFIP program does influence land use decisions at the local level. This ruling indicates that courts are refusing to allow FEMA to distance itself from its role in those decisions. Moving forward, FEMA will either have to take species impact into account or choose to administer NFIP in a way that avoids jeopardizing listed species.

(Alexandra Lizano, Meredith Nikkel)

RECENT CALIFORNIA DECISIONS

CALIFORNIA SUPREME COURT ADDRESSES THE NEED FOR PARTICIPATION AT PROPOSITION 218 HEARING TO CHALLENGE METHOD FOR APPLYING RATES FOR PROPERTY-RELATED SERVICE

Plantier v. Ramona Municipal Water District, ___Cal.5th___, Case No. S243360 (Cal. May 30, 2019).

The California Supreme Court recently issued an opinion in *Plantier v. Ramona Municipal Water District*, addressing whether exhaustion of administrative remedies before challenging a municipal water district's method for applying rates to property-related services is required under Proposition 218. The Court held that where a property owner challenges the method by which the local agency applies its rates to particular customers—but not the rates themselves—the owner may challenge the method without first having participated in the Proposition 218 protest hearing called to raise those rates.

Background

Plaintiffs in this case included Eugene Plantier, a restaurant owner, and two other property owners operating businesses with wastewater service from defendant Ramona Municipal Water District (District). Plaintiffs brought a class action lawsuit challenging a prior change in the District's method of applying its sewer rates to commercial properties whereby wastewater service charges were computed by multiplying the District's per-unit sewer rate by the number of Equivalent Dwelling Units (EDUs) the district had ascribed to a property owner's parcel. Although the District had just increased its per-unit sewer rates at the time this challenge arose, plaintiffs did not challenge that rate but instead challenged the District's EDU-based system for calculating wastewater service charges by asserting the method by which the District assigns EDUs is not compliant with Proposition 218's proportionality requirement. That requirement is found at Art. XII D, **§** 6, subdivision (b)(3) of the California Constitution and states that a property-related fee or charge shall not exceed the "proportional cost of the service attributable to the parcel."

The District argued that plaintiffs were barred from bringing suit because they had failed to exhaust their administrative remedies by participating in a Proposition 218 protest hearing conducted to consider and ultimately approve an increase in the District's per-EDU rates. Consistent with its hearing notice, the District's hearing addressed only the proposed change in the per-EDU rates and not the methodology by which the District calculated the number of EDUs for which each customer would be charged the new rates. The District argued that plaintiffs were able to raise their EDU-calculation challenges during the District's Proposition 218 hearing but failed to participate.

Proposition 218's Procedural Requirements

Proposition 218 was an initiative passed by the voters of California in 1996 adding Articles XIII C and XIII D to the California Constitution. Articles XIII C and XIII D impose notice and hearing requirements on property-related charges and fees levied by local government agencies, such as the wastewater service charges at issue in this case.

In this case, the District conducted a Proposition 218-mandated hearing only to consider a proposed increase per-EDU rate, and not to change its methodology for determining how each property owner is allocated the number of EDUs that comprise half of the equation for determining their wastewater service charges.

Proposition 218's Substantive 'Proportionality' Requirement

In addition to Proposition 218's procedural requirements, it added the substantive requirement that rates "shall not exceed the proportional cost of the service attributable to each parcel" to Article XIII D, § 6. This substantive requirement is known as Proposition 218's proportionality requirement.

Again, in this case the District computed the wastewater service charge for each property owner by multiplying the parcel's assigned EDUs by the per-EDU rate. Plaintiffs asserted that it was the method

of EDU assignment—not the per-EDU rates—that violated the Proposition 218's proportionality requirement. The alleged shortcoming of this method was that it is arbitrary—rather than proportional—to assign EDUs based on use and square footage.

At the Superior Court

The trial court held for the District, finding that the Proposition 218 hearings conducted by the District around that time to consider an increase to the per-EDU rate presented a protest opportunity for plaintiffs and was thus an unexhausted administrative remedy. The trial court relied on *Wallich's Ranch v. Kern County Citrus Pest Control Dist.*, 87 Cal.App.4th 880 (2001), which required plaintiffs challenging an assessment under a pest control law to first exhaust administrative remedies by raising a challenge at the agency's annual budget hearing. Equating that budget hearing to a Proposition 218 protest hearing, the trial court in *Plantier* concluded that plaintiffs should have protested the District's EDU allocation methodology at the hearing but failed to do so.

The Court of Appeal's Decision

The Court of Appeal reversed, holding that plaintiffs were not required to participate in the Proposition 218 protest hearing for raising per-EDU rates in order to challenge the District's method for assigning EDUs to customers. The appellate court reasoned that changing the number of EDUs applied to commercial customers was different from increasing the rate assigned to an EDU, which was the sole subject of the public hearing notice. Accordingly, the Court of Appeal reasoned that the District could not have changed its EDU-allocation method at the rate hearing even if plaintiffs had objected to the allocation method at the hearing. Acting on such a protest at these hearings may in itself have constituted a violation of Proposition 218 procedural requirements because members of the public had not been provided notice regarding any change to the allocation method that the District may wish to entertain in light of the plaintiffs' protest.

The California Supreme Court's Decision

In affirming the appellate court decision, the California Supreme Court concluded that plaintiffs were not challenging the District's new per-EDU rates and, therefore, were not required to exhaust their administrative remedies by participating in the Proposition 218 hearing on the proposed per-EDU rates increase. The Court explained that while exhaustion of administrative remedies is generally required before a claim can be validly brought before the courts, where that remedy is inadequate to resolve the dispute, plaintiffs may be excused for failing to exhaust that remedy. The Court held that a remedy is only adequate if it:

> . . .establishes clearly defined machinery for the submission, evaluation, and resolution of complaints by the aggrieved parties.

The Court reasoned that even if rate protest hearings under Proposition 218 were considered an administrative remedy, the District's protest hearing could not have provided an adequate remedy for the plaintiffs' challenge to the method of allocating EDUs because the hearing was limited to the per-EDU rate increase and did not encompass the allocation method. Due to the scope for which the hearing had been noticed, which constrained the District's ability to enacting only a change to the per-EDU rate, the Court found plaintiffs could not obtain an adequate remedy by participating.

In the end, the Court found that:

> . . .a party may challenge the method used to calculate a fee without first having participated in a Proposition 218 hearing called to consider a rate increase. Such a hearing does not provide an adequate remedy for a methodological challenge. We do not decide and express no view on the broader question of whether a Proposition 218 hearing could ever be considered an administrative remedy that must be exhausted before challenging the substantive propriety of a fee in court. . . . the District contends that allowing a party to sue without having first participated in the Proposition 218 hearing process renders that process and the duty to consider all protests meaningless. That is not so. This hearing process did what it is intended to do: give a majority of fee payors the chance to veto a rate increase and ensure the decisionmakers are aware of public opposition. It would be a meaningless exercise, however, to require a party to raise a methodological challenge at a hearing

where the agency has no obligation to respond and cannot resolve the challenge.

Conclusion and Implications

The implications of this case are narrow, and it is unlikely to have sweeping impacts on Proposition 218's procedural requirements in the future. The reason for this likely limited impact is that the Supreme Court focused on how narrowly the Proposition 218 notice to ratepayers had been drafted as the limiting factor to the District's ability to address plaintiffs' grievance through the hearings it conducted on the contemplated increase to its per-EDU rate. The takeaway from this is that had the Proposition 218 notice been drafted more broadly to include all aspects of the District's rate structure, plaintiffs would have likely not been excused from exhausting their administrative remedies before raising their concerns in court. Therefore, the *Plantier* decision provides a valuable lesson on how California courts are to construe Proposition 218 notices and how the administrative exhaustion doctrine operates where an administrative remedy is found to be inadequate. The Supreme Court's decision is available online at: https://www.courts.ca.gov/opinions/documents/S243360.PDF (Andreas L. Booher, Dan O'Hanlon)

FIRST DISTRICT COURT INVALIDATES LOCAL ORDINANCE IMPOSING GROUNDWATER EXTRACTION LIMITS

Gomes v. Mendocino City Community Services District, ___Cal.App.5th___, Case No. A153078 (1st Dist. May 14, 2019).

On May 14, 2019, the California Court of Appeal for the First Judicial District concluded that the Mendocino Community Services District was authorized to impose groundwater extraction limits, but nevertheless invalidated the ordinance at issue because it was not adopted with the proper statutory procedure.

Statutory Background

The Mendocino Community Services District (District) was created for the purpose of regulating wastewater, not groundwater. In 1987, the California Legislature amended the Water Code to allow the District to, by ordinance, establish programs for the management of groundwater resources (Act). To do so, the District is subject to a multi-step process, which involves two public hearings—the first to consider the groundwater management program and the second hearing to consider any objections to the implementation of the program. If more than 50 percent of voters file protests, the proposed groundwater management program must be abandoned and the District may not consider a new program for at least one year.

Factual and Procedural Background

In 1990, the District implemented a program, requiring property owners to obtain a groundwater extraction permit in certain circumstances generally involving new development, a new well, or a change in use. Extraction exceeding the permitted amount would be subject to daily fines. This program was adopted and implemented in compliance with the procedures specified in the Water Code.

In 2007, the District implemented a water shortage contingency plan. The plan describes four levels of water shortage criteria and corresponding measures to be taken for each level. Stage 4 is considered a water shortage emergency during which all property owners of developed parcels must obtain a groundwater extraction permit with allotment. While the water shortage contingency plan was the subject of a number of public hearings, the District acknowledges that it did not comply with the procedures set forth in Water Code in implementing the plan.

In February 2014, the District declared a Stage 4 water shortage emergency. In April 2014, the District sent petitioner a letter requiring him to obtain a permit. Petitioner appealed and, following a public hearing, the District concluded petitioner was required to acquire a permit. Subsequently, the District sent petitioner a notice of violation imposing a $100 per day fine, if he did not get a permit.

The District lowered the water shortage level to Stage 1 in December 2014, and to no water shortage condition in February 2015. Nevertheless, because

of the Stage 4 declaration, the District found petitioner remained subject to the permit and extraction limits—and continued sending petitioner notices of violation. After issuing these notices, the District began imposing fines which eventually totaled more than $35,000.

Petitioner filed this action seeking to invalidate the ordinance implementing the water shortage contingency plan on the basis that the District lacked the authority to impose groundwater extraction limits and alleging violations of state and federal constitutional requirements. Petitioner later amended his petition to allege that the District did not follow the proper notice and hearing procedures set forth in the Water Code. The trial court upheld the plan finding that the District had provided appropriate notice and opportunities for citizen participation and that the District's decision to require all property owners to abide by groundwater extraction limits was rationally related to a legitimate governmental purpose.

The Court of Appeal's Decision

The First District Court of Appeal rejected petitioner's argument that in the absence of express authorization to impose extraction limits, the District was prohibited from doing so. Instead, the court agreed with the District's position that the authority to manage groundwater granted by the Act inherently includes the ability to limit the quantity of groundwater that an individual user may extract. The court reasoned that the Act did not enumerate many of the powers that other groundwater management statutes include, such as, conferring powers to require conservation practices; regulate, limit or suspend extractions; impose spacing requirements on new extraction facilities; or impose reasonable operating regulations. The fact that the Act did not specifically provide for the power to limit groundwater extraction did not indicate that the District lacked the power to use other management tools articulated elsewhere with respect to groundwater management. Nor did petitioner cite any legal authority in support of his claim. The court therefore concluded that the District's authority to manage groundwater resources included the authority to impose groundwater extraction limits.

Nevertheless, the court held the water contingency plan to be invalid because the District had failed to comply with the specific procedures in the Act. The District argued, and the trial court agreed, that the notice and hearing requirements found in the Act applied only to the initial water management program, adopted in 1990, and that subsequent actions, such as the plan at issue, were amendments to the original program. The court found that the trial court's ruling disregarded the text of the Act. Relying on the plain language of the statute, the court reasoned that the Act authorizes the District to establish program**s**, plural, indicating that the District may establish more than one program and that each is not considered an amendment of the initial program. References to procedures for adopting **a** groundwater program, rather than *the* groundwater program indicated that each program must comply with the specified procedures.

The court further reasoned that the underlying policy of the Act was to permit property owners to participate meaningfully in the development of any groundwater management program and for the District to reject any proposed program unless more than half of the voters approved. The court noted that had the District followed the required procedures before implementing the water contingency plan at issue, changes to the plan may have been made or the plan may have been altogether abandoned. The court held that the measures were therefore invalid and void. The District, however, is not precluded from re-adopting such a program in accordance with the statutorily mandated procedures.

Conclusion and Implications

The court concluded that because the District failed to follow the proper statutorily mandated procedures, the water shortage program was void. The court reasoned that the underlying policy of the Act was to permit property owners to participate meaningfully in the development of any groundwater management program and for the District to reject any proposed program unless more than half of the voters approved. Had the proper procedures been followed, changes to the plan may have been made or the plan may have been altogether abandoned. The court, however, held that the District is not precluded from re-adopting the program in accordance with the mandated procedural requirements.

While the Water Code provisions at issue in this matter are specific to the Mendocino City Community Services District, the case provides an example of application of the rules of statutory interpretation. Moreover, the court's finding that management of

groundwater necessarily implies the authorization to use a wide range of management techniques may serve to broaden other entities' statutory authority to manage groundwater.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/A153078.PDF (Christina Berglund)

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